123

Supreme Court, U.S.
FILED
081163 JAN 6 - 2009
OFFICE OF THE CLERK

No. ——

IN THE
Supreme Court of the United States

John J. Garrett,

Petitioner

v.

Lister Flynn & Kelly, P.A., Toney Lister, and Brendan Delaney,

Respondents

On Petition For Writ Of Certiorari
To The South Carolina Court Of Appeals

No. 2007-UP-530. Decided November 1, 2007

PETITION FOR WRIT OF CERTIORARI

28 U. S. C. § 2403(b) may apply.

John J. Garrett, Petitioner *Pro Se*
180 Berrys Pond Drive
Duncan, South Carolina 29334
Telephone: (864) 486-1514

QUESTION

Whether the South Carolina Appellate Court decided a novel question of federal law pertaining to the Americans With Disability Act of 1990, 42 U.S.C. Sec. 12101 *et seq*, that has not been, but should be, settled by this Court, by the State's Appellate Court deciding in such a way that is believed to be in conflict with the intended rights that relevant decisions of this Court have implied under Title II; as State Courts' current administration of the requirement of service of process requires usage of a State statute in such a way that under events such as Garrett experienced violate ADA's guarantee against discrimination in a way that may, also, be in violation of the Equal Protection Clause, against this petitioner and others similarly situated; by virtue of the debasement of their status based on their having illnesses such as heart disease, multiple sclerosis, or cognitive impairment, to deny an equal chance in the court processes to a *pro se* litigant that is a qualified individual with disability as defined by the ADA; by a law that creates an irrefutable

QUESTION - Continued

presumption that all litigants will possess the resources during a statutory timed period and, as such, gives a State court authority to dismiss with prejudice all rights without a hearing of the merits that acts to foreclose all litigation of the elements of a Complaint.

TABLE OF AUTHORITIES CITED

CASES **PAGE**

Bailey v. Kennedy, 349 F.3d 731,739 (4th Cir. 2003).....6

Boddie v. Connecticut, 401 U.S. 371, 380.....6

Gregg v. Georgia, 428 U.S. 153 (1976).....5

Lane v. Wilson, 307 U.S. 268,275.....6

*Maxwell v. Gomez,*350 S.C. 563, 567 S.E.2d.....4

Smith-Haynie v. Dist. of Columbia, 155 F.3d 575, 579, 580 (D.C.Cir. 1998).....5

Tennessee v. George Lane et al 6 Cir.....5

U.S. Airways, Inc. v. Barnett, 122 S.Ct.1522-23 (2002) 5

Zant v. Stephens, 462 U.S. 890 (1983).....5

Zerilli-Edelglass v. New York City Transit Auth. 333 F.3d 74, 80 (2d Cir. 2003).....4

STATUTES AND RULES

Page

Fourteenth Amendment to the U. S. Const.....2

Rule 4(m) Federal Rules of Civil Procedure.....3

Rule 3 SCRCP.....2

Rule 6(b) SCRCP.....4

Title II: The Americans with Disability Act of 1990.....2, 4, 5, 6

28 U.S.C. § 1257(a).....2

TABLE OF CONTENTS

OPINIONS BELOW..... 1

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....4

CONCLUSION 6

INDEX TO APPENDICES

Page

Appendix A: Decision South Carolina Court of Appeals.....1a

Appendix B: Order of South Carolina's Court of Appeals Denying Rehearing.....13a

Appendix C: Order of State Supreme Court Denying Writ of Certiorari.....14a

Appendix D: Decision of South Carolina's Spartanburg Court of General Sessions on Rehearing.....16a

Appendix E: Decision of South Carolina's Spartanburg Court of Common Pleas.....18a

Appendix F: Constitutional and Statutory Provisions.....29a

Appendix G: Letter of Robert Ringel, MD...33a

Appendix H: Affidavit of J. Christopher Caston, M.D.....36a

Appendix I: Additional information for the Court's consideration.....38a

IN THE

Supreme Court of the United States

No. _____

John J. Garrett,

Petitioner

v.

Lister Flynn & Kelly, P.A., Toney Lister, and Brendan Delaney,

Respondents

On Petition For Writ Of Certiorari
To The South Carolina Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Petitioner Garrett respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits, the South Carolina Court of

Appeals, Opinion Number 2007-UP-530, Filed November 14, 2007, appears at Appendix A to the petition and is unpublished.

The opinion of the South Carolina Spartanburg Court of General Sessions, Order Case Number: 2005-CP-42-597, appears at Appendix E to the petition and is unpublished.

JURISDICTION

The date on which the highest court, The Supreme Court of South Carolina, decided the case was October 8, 2008. A copy of that decision appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (*see* Appendix F)

Fourteenth Amendment of the United States Constitution.

Title II-2.0000 QUALIFIED INDIVIDUALS

WITH DISABILITIES.

Federal Rules of Civil Procedure.

South Carolina Code.

South Carolina Rules of Civil Procedure.

STATEMENT OF THE CASE

Petitioner/respondents had an attorney client relationship. Alleged is a breach of duty by failure to exercise that level of skill and knowledge which is ordinarily exercised by lawyers of similar expertise under similar circumstances with misconduct a proximate cause of injuries.

Denied a community lawyer out of prejudice forced Garrett *pro se*. The Complaint alerted to his disabilities. Illness events of being hospitalized the day after filing and on rehospitalized day discharged by stroke APPENDIX G caused him to lack capability by insufficient present ability during the statutory

limit for service. State denied modification.[1] In the 8Sep05 hearing he asked if disability applies. In rehearing he gave Affidavit (Appendix H) he met "the legal criteria for [disability]." That court failed to give reasonable accommodation is believed to be in conflict with substantive purposes of Title II. Order of 29Sep05 (Appendix E) shows the trial court's reason to deny modification to Garrett's request is "the law does not provide for such exceptions."[2] Appeal was based on "failing to give a *pro se* appellant with qualified ADA disability extended time to complete a proper service."

Reasons for Granting the Petition

State's way in effect gives invidious usage

---

1 Rule 6(b) SCRCP specifies it applies when there is a deadline. *Maxwell v. Gomez*, 350 S.C. 563,567 S.E2d 496 (Ct.App.2002)S.C.Sup.Ct.,Op.25761, filed December 23, 2003.

2 Contrast to *Zerilli-Edelglass v. N. Y. City Transit Auth.*,333 F.3d 74,80(2d Cir. 2003) "Equitable tolling is generally considered appropriate where . . . a plaintiff's medical condition or mental impairment prevented . . . proceeding in a timely fashion."

prospect to disabled *pro se* litigants.[3] Illness should be reason to modify to give a fair chance in court.[4] As peculiar effects are caused by disparity of a disabled vs a lawyer to consider life events to a disabled *pro se* litigant. Justice Souter and Justice Breyer concurred with Justice Ginsburg, in the *Case of Tennessee, Petitioner v. George Lane et al,* May 17, 2004, on writ of certiorari to the U.S. Court of Appeals for Sixth Circuit: "Central to the Act's primary objective, Congress extended the statute's range to reach all government activities, 12132 (Title II), and required reasonable modification to rules, policies, or practices." In *Zant v. Stephens,* 462 U.S. 890 (1983) as in *Gregg v. Georgia,* 428 U.S. 153 (1976), this Court acts to ensure "similarly situated defendants" would be protected

---

3 In *Smith-Haynie v. Dist. of Columbia*, 155 F.3d 575, 579 (D.C. Cir. 1998), Court held that the doctrine of equitable tolling "can fairly be read to encompass cases where a plaintiff has been unable to [timely file] because of disability."

4 As is supported in *U.S. Airways, Inc. v. Barnett*, 122 S.Ct. 1522-23 (2002), where the Court said that "[t]he statute seeks to diminish or to eliminate the . . . bar [to] those with disabilities from participating fully in the Nation's life . . ."

against influence of forbidden factors, such as race. Here, to protect *pro se* ADA-disabled litigants replace 'race' with 'ADA qualified disability' to give all trial judges cause to give a fair opportunity by ruling to protect a right. *Bailey v. Kennedy,* 349 F.3d 731, 739 (4th Cir. 2003).

Conclusion

ADA requires states to remove boundaries that serve to discriminate.[5] Garrett shows no intent to be ill and certainly there is no prejudice on moving the court process to include giving a fair chance to access the court.

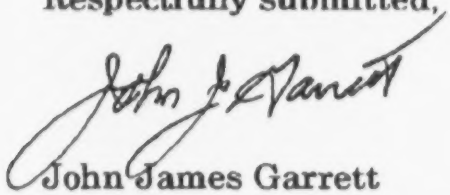
Garrett should be entitled to a writ of certiorari, if not a directed judgment in his favor based on established law. South Carolina needs to amend its statute to place an exception in its law to give its courts basis to extend time for a qualified disabled *pro se* litigant.[6]

---

5 *Boddie v. Conn.*, 401 U.S. 371, 380,(1971) says " meaningful opportunity . . .must be protected against denial by particular laws that operate to jeopardize it for particular individuals."

The petition for a writ of certiorari should be granted.

Respectfully submitted,



John James Garrett

Dated: January 6, 2008

THIS OPINION HAS NO PRECENDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)92), SCACR.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

John J. Garrett, Appellant v. Lister, Flynn, & Kelly, P.A., Toney Lister, and Brendan Delaney, Respondents.

Appeal from Spartanburg County Roger L. Couch, Circuit Court Judge

Unpublished Opinion No. 2007-UP-530 Submitted November 1, 2007 -- Filed November 14, 2007.

AFFIRMED

John J. Garrett, of Reidville, for Appellant.

Mason A. Goldsmith, of Greenville, for Respondents.

PER CURIAM: In this civil case, we affirm the trial court's determination that John Garrett (Garrett) failed to follow the proper service of

process requirements as set out in the South Carolina Rules of Civil Procedure. We also conclude the trial court properly dismissed the case with prejudice.

FACTS

On February 28, 2005, Garrett filed a complaint against the law firm of Lister Flynn, & Kelly, P. A. (Law Firm), attorney Toney Lister (Lister), and attorney Brendan Delaney (Delaney). In his complaint, Garrett alleged numerous causes of action. The acts which Garrett complained of occurred on March 15, 2002, nearly three years prior to filing the complaint.

On June 10, 2005, Garrett personally attempted to serve Delaney at Delaney's place of business. However, Delaney was not present at that time. On June 20, 2005, Garrett attempted to serve Law Firm by registered mail, return receipt requested. The registered mail was not restricted to Law Firm's registered agent, and the registered agent did not sign for the delivery. On June 21, 2005, by way of regular mail rather than certified Garrett, attempted to serve Lister.

On July 8, 2005, the Respondents filed a Motion to Quash the Service of Process. On July 25, 2005, Garrett Filed his response to this motion.

Prior to filing his response, Garrett filed an amended complaint on July 11, 2005. The trial court found Garrett had failed to properly serve the Respondents. Garrett argued he was unable to effectuate service because he was disabled. Garrett asked the trial court to grant him an extension so that he could properly serve the Respondents. The trial court denied this request and dismissed the case with prejudice because the statute of limitation ran before Garrett filed his amended complaint, and Garrett did not perfect service of process on the Respondents before the statute of limitation ended.

On appeal, Garrett makes the following nine arguments: (1) the trial court erred in finding service to Law Firm was not properly made; (2) the trial court erred in failing to conclude Delaney was [not] properly served; (3) the trial court should have allowed Garrett an extension of time in which to serve the Respondents; (4) the trial court erred on

ruling on the statute of limitations issue; (5) the trial court erred by dismissing the case with prejudice; (6) the trial court by failing to put into evidence a document Garrett provided; (7) the trial court, by requiring Garrett to stand during oral arguments, denied Garrett the opportunity to compete with opposing counsel on an equal basis; (8) Garrett was denied the opportunity to check out law books from the Spartanburg Library; and (9) the trial judge erred by failing to recuse himself. We address each argument in turn.

LAW/ANALYSIS

A. The trial court properly found Garrett did not serve Law Firm.

Garrett's first argument is the trial court improperly concluded that he failed to properly serve Law Firm. We disagree.

Garrett attempted service upon Law Firm by certified mail. Rule 4(d)(8) of the South Carolina Rules of Civil Procedure provides that a partnership may be served "by registered or certified mail, return receipt requested and

delivery restricted to the addressee." (emphasis added).

The Certificate of Service clearly shows Garrett failed to restrict delivery as required by Rule 4. Thus, the trial court properly concluded Garrett did not serve Law Firm.

B. The trial court correctly concluded Garrett improperly served Delaney.

Garrett's second argument is the trial court erred by not concluding he properly served Delaney. We disagree.

Rule 4(c) of the South Carolina Rules of Civil Procedure states:

> Service of summons may be made by the sheriff, his deputy, or by any other person not less than eighteen (18) years of age, not an attorney in or a party to the action. Service of all other process shall be made by the sheriff or his deputy or any other duly constituted law enforcement office or by any person designated by the court who is not less than eighteen (18) years of age and

not an attorney in or a party to the action . . .

The Certificate of Service states that Garrett personally attempted to serve Delaney at Delaney's place of business. Garrett is a party in the lawsuit against Delaney, thus he cannot effectuate service. Therefore, the trial court properly concluded that Delaney was not served.

C. The trial court properly ruled that Garrett was not entitled to an extension of time in which to serve the respondents.

Garrett's third argument is the trial court should have granted an extension so that Garrett could properly serve the Respondents. We disagree.

Rule 3(a) of the South Carolina Rules of Civil Procedure provides:

> A civil action is commenced when the summons and complaint are filed, with clerk of court if: (1) the summons and complaint are served within the statute of limitations . . . . or (2) if not served within the statute of limitations, actual service

must be accomplished no later than one hundred twenty days after filing.

In the present case, Garrett filed the complaint on February 28, 2005. The acts which Garrett complained of occurred on March 15, 2002, nearly three years prior to filing the complaint. The statute of limitations for the underlying causes of action ran in March 15, 2005. Garrett failed to properly serve the Respondents by March 15, 2005, within the statue of limitations.

However Garrett could commence the action if he had served the Respondents within 120 days of filing the complaint. Thus, Garrett's suit would have been timely and not barred by the statute of limitations if he had actually served the Respondents by June 28, 2005, 120 days after filing the complaint. Rule 3(a), SCRCP.

As discussed above, Garrett failed to properly serve the Respondents. Consequently, the statute of limitations ran on June 28, 2005.

Garrett argues the trial court should have given him an extension to serve the Respondents

because he was disabled during the time period between filing the complaint and the expiration of the one hundred twenty day period. In other words, Garrett asks this Court to carve out an exception to the 120 day time period set out in Rule 3 if an individual is disabled.

When interpreting language of a court rule, the same rules of construction employed in interpreting statutes apply. State v. Brown, 344 S.C. 302,307, 543 S.E.2d 568,571 (Ct. Appl. 2001j). "Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." Id. (internal quotations and citations omitted). The cardinal rule of statutory construction is to determine and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). The best evidence of legislative intent is the text of the statute. Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002) (internal quotations and citations omitted). If, the terms of the statute are clear, the court must apply

those terms according to their literal meaning. City of Columbia v. Am. Civil Liberties Union of S.C., Inc., 323 S.C. 384, 387, 475 S.E.2d 2d 747, 749 (1996).

Rule 3 does not state an exception to the time period provided therein if an individual is disabled. It is not within the purview of this Court to carve such an exception. See Wiggins v. Edwards, 14 S.C. 126, 129, 442 S.E.2d 169, 171 (1994) ("This Court is without authority to alter the plain and unambiguous language of the statute.").

D. The trial court did not err by ruling on the statute of limitations issue.

Garrett seems to argue the trial court should not have addressed the statute of limitations issue because it was never before the trial court. We disagree.

Garrett, in response to Respondents Motion to Quash Service state, "As the 120 days are out, any decision to dismiss may conclude any opportunity to recover even if the decision is made without prejudice since the Statute of Limitation

may have run and refiling may not be an option." Garrett brought the issue of statute of limitations to the trial court's attention, and the trial court was proper to address it.

E. The trial court did not err by dismissing the case with prejudice.

Garrett's fifth argument is the trial judge erred by dismissing the case with prejudice. We disagree.

As explained above, the statute of limitations in this case ran on June 28, 2005. The trial court issued an order on September 29, 2005, three months after the statute of limitations expired. The trial curt properly dismissed the case with prejudice because Garrett was barred from refiling this case.

F. The trial court did not err by failing to put into evidence a document Garrett provided.

On October 13, 2005, Garrett filed a Motion to Amend. A hearing was held on this motion on December 12, 2005. During this hearing, Garrett attempted to introduce a letter from Dr.

Christopher Caston. The trial court declined to consider this letter when issuing its order.

Garrett does not provide authority as to why the trial court's decision is improper Thus, we consider the issue abandoned. Glasscock, In. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (holding statements made without supporting authority are deemed abandoned on appeal and are not present for review).

G. Garrett's final three arguments are not preserved for review.

In his final three arguments, Garrett contends the trial court, by requiring Garrett to stand during oral arguments, denied Garrett the opportunity to compete with opposing counsel on an equal basis; Garrett was denied the opportunity to check out law books from the Spartanburg Library; and the trial judge erred by failing to recuse himself.

We do not address these issues because they were neither raised to nor ruled upon by the trial

court. Wilder, Corp. v. Wilke, 330 S.C. 71. 76, 497 S.E.2d 731, 733 (1998)("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

CONCLUSION

Accordingly, the trial court's decision is **AFFIRMED.**[1]

ANDERSON, SHORT, and WILLIAMS, JJ., concur.

---

1 We decide this case without oral arguments pursuant to Rule 215, SCACR.

THE SOUTH CAROLINA COURT OF APPEALS

John J. Garrett,

Appellant

Lister, Flynn & Kelly, P.A. Toney Lister and Brendan Delaney,

Respondents

The Honorable Roger L. Couch

Spartanburg County

Trial Court Case No. 2005-CP-42-00597

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

s/ Ralph King Anderson, Jr. J. Anderson

s/ Paul E. Short, Jr. J. Short

s/ H. Bruce Williams J. Williams

Appendix B

Columbia, South Carolina December 20, 2007

(Seal) SUPREME COURT OF SOUTH CAROLINA

NIL ULTRA

THE SUPREME COURT OF SOUTH CAROLINA

DANIEL E. SHEAROUSE, CLERK OF COURT

BRENDA F. SHEALY, CHIEF DEPUTY CLERK

POST OFFICE BOX 11330 COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080 FAX (803) 734-1499

October 8, 2008

Mr. John J. Garrett

180 Berrys Pond Drive

Duncan, SC 29334

Re: Garrett, John v. Lister, Flynn & Kelly

2005-CP-00597

Dear Mr. Garrett:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

Appendix C

"Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.

For the Court

October 8, 2008."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

s/ Daniel E. Shearouse

CLERK

DES/DMH

Appendix C

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

John J. Garrett, Plaintiff

v.

Lister, Flynn & Kelly, P.A. Toney Lister and Brendan Delaney, Defendant.

ORDER Case Number: 2005-CP-42-597

On September 29, 2005, this Court issued an Order quashing service of the Summons & Complaint the above-captioned case and dismissing the action with prejudice on the grounds that the case had not been properly commenced before the running of the Statute of Limitations nor within the additional time after filing as allowed by SCRCP 3. On October 13, 2005, Plaintiff filed a Motion to Amend. A hearing was held on December 12, 2005 on this most recent motion. At this hearing and in Plaintiff's memorandum to Support Motion to Support, the Plaintiff fails to state sufficient grounds upon which relief may be granted.

Appendix D

At the conclusion of the December 12, 2005 hearing, Plaintiff submitted to the Court and to opposing counsel, a photocopy of what appears to by a letter from Dr. Christopher Caston of the Upstate Psychiatric Associates, PA. This letter addresses the issue of Plaintiff mental competency. This letter is not in proper form for the court to consider th information contained there.

If the letter were in proper form, it would still not be proper for the Court to consider this information because it addresses as issue that should have been brought before the Court at the initial hearing in this matter.

THEREFORE, it is the Order of this Court that Plaintiff's Motion to Amend is denied.

IT IS SO ORDERED

s/Roger L. Couch

Spartanburg, South Carolina — Roger L. Couch

December 14, 2005 — Presiding Judge

(date stamp) CLERK OF COURT SPARTANBURG COUNTY 2005 DEC 16 PM 2:12 MARC KITCHENS

Appendix D

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
COURT OF COMMON PLEAS
C. A. No.: 05-CP-42-597

John J. Garrett, Plaintiff

v.

Lister, Flynn & Kelly, P.A., Toney Lister, and Brendan Delaney, Respondents

ORDER

THIS MATTER came before me on Motion of the Defendants to Quash Service of Process and Dismiss and, reserving the rights under that Motion in the alternative to make the Complaint (sp) More Definite. It appears from the record that Plaintiff filed a Complaint which set out numerous causes of action against the Defendants including Negligence, negligent Misrepresentation, Intentional Infliction of Emotional Distress and Breach of Contract. Defendants filed a second Motion after Plaintiff again attempted service of process, essentially on the same grounds. Plaintiff filed a Motion in response to Defendants' Motion. The Plaintiff, in his Response, moved to amend his

service of process, claiming reliance upon SCRCP Rule 4. The matter was hard at the Spartanburg county Courthouse on September 8thg, 2005. Present were Plaintiff, representing himself *pro se*, and Defendants and their attorney, Mason A. Goldsmith.

Prior to argument, the Court noted for the record that it had prior dealings with both parties while in private practice including representation of the Plaintiff and the active practice of law with Toney Lister for a period of time in excess of twenty years. I find that both the Plaintiff and Defendants acknowledged the statements of the Court and neither asked for a recusal and the Court finds that these relationships would not interfere with the Court's ability to decide this matter.

Findings of Fact

Plaintiff represents himself in this action, *pro se*, both in his pleadings, in his response to Defendants' Motion, and before this Court at oral argument. Although Plaintiff is a non-lawyer, he seems quite adept at the legal process. The records of the Spartanburg County Clerk of Court's office reveal that Plaintiff has been and currently is

involved in numerous separate lawsuits. He represents himself in certain of those suits.

On February 28, 2005, Plaintiff filed the Complaint in this action. He first attempted service in June of 2005. A Certificate of Service from the Plaintiff states that Plaintiff attempted to serve Defendant Lister by mailing the pleadings to him at his business address on June 21, 2005. A second Certificate of Service states that Plaintiff had James F. Edwards, Jr. accept service for Defendant Delaney on June 10, 2005 at Defendant Delaney's place of business. A third Certificate of Service dated June 20, 2005 shows that the Plaintiff attempted to serve Lister, Flynn & Kelly, P.A. by Registered Mail, Return Receipt Requested which was apparently accepted by Angela G. Walker at the office of Cox, Lamb and Seeley, Pl. A., another law firm in Spartanburg. These Certificates of Service are insufficient on their face in that they do not comply with the rules for service.

Plaintiff contended in his response to Defendants' Motion, and argued before the Court at oral argument, that the reason for the lengthy

delay between the filing of the Summons and Complaint and his efforts to effectuate service of process is attributable to various of his health problems. However, Plaintiff does not deny and the record in the Clerk of Court's office reveals that subsequent to the filing of this action Plaintiff filed another, lengthy Complaint in a different action in March of 2005. Plaintiff argues that his health problems should somehow excuse the delay between the February filing and the June attempted service. Plaintiff obviously anticipates a statute of limitations problem exists because in his response to Defendants' Motion he states that "[a]s the 120 days are out, any decision to dismiss may conclude any opportunity to recover even if the decision is made without prejudice since the statute of limitations may have run and refiling may not be an option." He obviously refers to the running of the Statute of Limitations in March, 2005, three (3) years from March 15, 2002, as is seen by reference to Paragraphs 5 and 88 in the Complaint. Ironically, Plaintiffs own Complaint together with his Motion and oral argument have put the matter of the running of the Statute of Limitations at issue.

Appendix E

In oral argument Plaintiff admitted his failure to properly serve Defendants before the running of the 120 days from the filing date. Therefore, what Plaintiff really would have this Court do is create an exception to excuse a failure by Plaintiff to achieve service of process within the three (3) year statute of limitations plus the additional 120 days from filing allowed by SCRCP 3, with this newly created exception based upon the health of the Plaintiff.

By admitting that he did not properly serve Defendants, and that service has yet to be perfected, Plaintiff admits the validity of Defendants' arguments; that is, that they have not been properly served. Plaintiff has also admitted, factually, by; his Complaint, Motion and oral argument that the4 Statute of Limitations has run.

Conclusions of Law

The South Carolina Rules of Civil Procedure clearly state the requisites of service of process. It is black letter law that requires no citation that without the proper service upon a Defendant this Court has no jurisdiction over that Defendant.

Appendix E

Plaintiff knows that he has a statute of limitation problem. However, neither the fact that a party has a statute of limitations problem nor the fact that the party may have some health concerns or limitations serves to modify the requirements of the SCRCP as to service of process, nor to extend the statute of limitations. Put another way, even if the Court accepts Plaintiff's contentions that it was his health that prevented a more prompt service of process, which would be difficult to accept in light of the fact that he filed different, lengthy complaints in unrelated cases during the month after he filed the present lengthy complaint, nevertheless the law does not provide for such exceptions.

Plaintiff argues that SCRCP 4(i) should be applied in the present matter and that this Rule would relieve him of his failure to achieve proper service in a timely manner. The plain language of that Rule reveals that it is not applicable to address a failure to properly serve a party. Rule 4(i), in a appropriate situation and in the Court's discretion, allows for the process (e.g., the

document) or the proof of service (e.g., the document detailing the particulars of service, usually an affidavit of service) to be amended. This Rule does not allow a retroactive correction of a failure to properly serve a party, nor to extend a statute of limitations. Furthermore, the Rule only may be applied where there is no material prejudice to the substantial rights of the adverse party. It would be hard to imagine greater prejudice than a Court finding jurisdiction over a party where there is none, or extending the statute of limitations, under the guise of allowing an "amendment" to a failed service of process.

THEREFORE, based upon Defendants' challenge to service of process, and in light of the admissions by Plaintiff it is clear that Plaintiff has not properly served Defendants and has allowed the Statute of Limitations to run. A review of the file reflects the Plaintiff attempted to cure the defective service by filing with the Clerk and attempting to serve a Summons and Amended Complaint on these Defendants. This did not cure Plaintiff's defective service. After such filing of the

Amended Complaint, the Defendants filed a Request for Hearing, Renewal of Previous Motions and Motion for More Definite Statement pursuant to SCRCP 12(b)(5) and 12(e), which preserved their jurisdictional argument. Although this second Motion and Defendants' Motion to Make More Definite and Certain are also now before the court, it appears that the Court need not address the service of the Amended Complaint since the decision herein renders that point moot. The Plaintiff's failure to properly effect service of the original pleadings within 120 day requires dismissal of this case. Because of the decision to dismiss this action the Court did not, and has no need to, address the Defendant's Motions which relate to the Amended Complaint.

CONCLUSION

After carefully considering the documents in the file, arguments of the parties, and admissions by the Plaintiff, this Court finds that Defendant Delaney was not properly served as a result of the Plaintiff attempting to personally deliver papers to Defendant Delaney's place of business and having

an unauthorized person accept service of the same. Defendant Lister was not served personally or by leaving copies of the Summons and Complaint at his dwelling house or usual place of abode or by delivery of said pleadings to an agent authorized by appointment or by law to receive service of process, or by certified mail, restricted delivery. Further,, Lister, Flynn & Kelly, P.A. was not served by delivering a copy of the Summons and Complaint to an officer, managing or general agent, or any other agent authorized by appointment or by law to receive service of process, or by certified mail, restricted delivery to the Registered Agent for service of process. Johnny Roberson and P)Phyllis Fredrick v. Southern Finance of South Carolina, Inc., SC OP No. 26001 filed June 20, 2005.

As seen from Plaintiff's Complaint (Paragraphs 5 and 88) the basis for Plaintiff's claims originated on or before March 15, 2002. He clearly says the Defendants fired him as a client at that time. Whatever he complains of that Defendants allegedly did wrong or failed to do occurred on or before March 15, 2002. Plaintiff

filed his Summons and Complaint on February 28, 2005, within the statute, but did not attempt service until June, 2005, well after the statute ran. Because his effort at service in June was fatally flawed, Plaintiff failed to properly served the pleadings within 120 days after filing as required by SCRCP 3. Plaintiff acknowledged such in his written Response and on the record. Although Plaintiff argued he was medically disabled during this period of time and should be granted more time to serve said Defendants, the Court takes judicial notice that the Plaintiff was physically able to file at least two other suits, *pro se,* during this same period of time. Further, the Court record reveal that Plaintiff was represented by counsel in another suit about this same time period. It is, therefore, the finding of this Court that Plaintiff's Motion is denied. The Complaint is dismissed under Rule 3 of the SCRCP as the result of the Summons and Complaint not being properly served within the Statute of Limitations plus 120 days after the date of filing (since the pleadings were filed prior to the funning of the Statute of Limitations).

Appendix E

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that service of the Summons and Complaint of the Plaintiff on the Defendants is hereby quashed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as of the date of this hearing on September 8, 2005, this case had not been properly commenced before the running of the Statute of Limitations nor within the additional time after filing allowed by SCRP 3; as a result this case is hereby dismissed, with prejudice.

AND IT IS SO ORDERED.

GIVEN under my hand and the seal of this Court this Sept day of 29th, 2005.

s/Roger L. Couch [by] Callie Frey, DC

ROGER L. COUCH, JUDGE

Spartanburg, SC

(date stamp) CLERK OF COURT SPARTANBURG COUNTY 2005 SEP 29 PM 12:22 MARC KITCHENS

Appendix E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment of the United States Constitution.

Section 1. **All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

Federal Rules of Civil Procedure: 4 (m): Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the

plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

South Carolina Code Section 15-3-20. General rule as to time for commencement.

(A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.

(B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.

South Carolina Code Section 15-3-40.

Exceptions as to persons under disability.

If a person entitled to bring an action mentioned in Article 5 of this chapter or an action under Chapter

78 of this title, except for a penalty or forfeiture or against a sheriff or other officer for an escape, is at the time the cause of action accrued either: (1) within the age of eighteen years; or (2) insane; the time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended: (a) more than five years by any such disability, except infancy; nor (b) in any case longer than one year after the disability ceases.

South Carolina Rules of Civil Procedure.
RULE 6 TIME.

(b) Enlargement. When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the time may be extended by written agreement of counsel for an additional period not exceeding the original time provided in these rules, or the court for cause shown may at any time in its discretion (1) with or without written motion or notice order the period enlarged if request therefor is made before the expiration of

the period as originally prescribed or extended or (2) upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done. The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them. The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order.

Appendix F

ROBERT A. RINGEL, M.D.

Spartanburg Neurological Services, P. A.

362 North Pine Street Spartanburg, South Carolina 29302 (864) 542-2510 Fax: (864) 583-1311

December 12, 2005

Mr. John Garrett

Dear Mr. Garrett:

You may provide this letter to whomever you feel appropriate. Mr. Garrett is currently 62 years old. He has been my patient since August 14, 1992 and has a history of relapsing and remitting multiple sclerosis becoming insidiously secondary progressive in type probably around June 20, 2001. This is associated with increased weakness in the left leg and increased difficulty with spastic gait. Subsequent to this, he was found to have obstructive sleep apnea, known history of coronary disease with decreased cardiac output and symptoms of exertional dyspnea and congestive heart failure.

His cardiac ejection fraction was 25 to 30%. Mr. Garrett presented at Spartanburg Regional

Medical Center emergency room and was initially seen by Dr. Hill. He was referred to Dr. Pares, covering. It was felt at that time that he either had a lower extremity weakness due to a stroke or exacerbation of multiple of sclerosis. Since that time, Mr. Garrett has had increased weakness, fatigue, shortness of breath, impaired concentration and memory intermittently and has had an evaluation for prostate carcinoma.

During that period of time, beginning on March 8th, Mr. Garrett was not capable of having the endurance, physical or mental capacity to act in his own legal behalf through his pending court activities. By early July of this year, he was again mobile and independent.

Through the period of March 8th through early July of this year, I believe with reasonable medical certainty, that Mr. Garrett could not act in his own capacity much in terms of his own activities of daily living, let alone represent himself in a court case. It is my understanding also during that period that Mr. Garrett did not have legal representation in this community to act in his

behalf. If you have question, please feel free to call me or with Mr. Garrett's permission you can access his medical records

Thank you for your time and patience.

Sincerely yours,

s/Robert A. Ringel

Robert A. Ringel, MD

RAR/alj T: 12/16/05

Appendix G

UPSTATE PSYCHIATRIC ASSOCIATES, P. A.
J. CHRISTOPHER CASTON, M.D.
1690 SKYLYN DRIVE, SUITE 240
SPARTANBURG, SOUTH CAROLINA 29307-1075
(864) 585-0328 * FAX (864) 585-8808

December 5, 2005 Affidavit: Regarding the competency of John J. Garrett

John Garrett has been treated by me since 1981 and he has been on psychotropic medications continuously for the past twenty-four years. He has been treated for anxiety and depression as well as for a Post Traumatic Stress Disorder. He has also had cognitive impairment episodically related to multiple sclerosis that is treated by his neurologist. He is bothered by chest pain episodically related to his severe coronary artery disease that is treated by his internist. Mr. Garrett does meet the legal criteria for mental incompetency due to a mental condition that precludes understanding the nature or effects of one's actions and an inability to understand or protect one's rights because of an overall inability

to function in society. Episodically, the mental condition has required care in a hospital as well as causing cognitive impairment. Reality testing is episodically impaired as a result of a Post Traumatic Stress Disorder that Mr. Garrett developed in regard to his military service. Trigger events activate prior military service activities that set off impairments in reality testing causing significant paranoid thinking and ideas of reference.

Sincerely,

s/J Christopher Caston, M.D.

J. Christopher Caston, MD

Notary: s/Melody T. Glin My commission expires 11/30/2014 date 12/5/05

Appendix H

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

Roger L. Couch, Circuit Court Judge

C.A. NO. 2005-CP-42-597

John J. Garrett as Appellant Pro Se Appellant

v.

Lister, Flynn & Kelly, P.A., Toney Lister, and Brendan Delaney Respondents

MOTION FOR EXTENSION OF TIME

YOU WILL PLEASE TAKE NOTICE, that the Respondents' attorney, Mason A. Goldsmith, does hereby move this Court for a thirty (30) day extension of time in which to file the Respondent's Initial Brief. Grounds for this request are that the Respondents' attorney recently returned from a long planned and lengthly vacation and must now deal with this Appellate matter and a hectic motion and trial schedule.

Respectfully submitted, LOVE, THORNTON, ARNOLD & THOMASON, P.A.

By: s/ Mason A. Goldsmith Post Office Box 10045, F.S. Greenville, South Carolina 29603

(864) 242-6360 (864) 271-7972 facsimile agoldsmith@ltatlaw.com Attorneys for Respondent

Date: 10/24/2006

Greenville, South Carolina

Appendix I

THE SOUTH CAROLINA COURT OF APPEALS

John J. Garrett, Appellant

v.

Lister, Flynn & Kelly, P.A. Toney Lister and Brendan Delaney, Respondents.

The Honorable Roger L. Couch Spartanburg County Trial Court Case No. 2005-CP-42-00597

ORDER

For good cause having been shown, the time for the respondent to serve and file the respondent's initial brief and designation of matter in the above entitled matter is hereby extended until December 4, 2006.

IT IS SO ORDERED.

KAYE G. HEARN, CHIEF JUDGE

For the Court

BY s/ Kenneth A. Richstat

CLERK

Columbia, South Carolina 10/27/ 2006

cc: John J. Garrett

Mason A. Goldsmith, Esquire

(letter heading) LOVE, THORNTON, ARNOLD & THOMASON, P.A. February 4, 2008

Daniel E. Shearouse, Clerk of Court The Supreme Court of South Carolina P.O. Box 11330 Columbia, SC 29211

Re: John J. Garrett v. Lister, Flynn & Kelly, P.A., et al. Case Tracking No.: 2008-77846 LTAT File No.: 05.0650

Dear Clerk of Court:

Please allow this letter to serve as our request for a thirty (30) day extension to file our Response to Petitioners Petition for Writ of Certiorari in the above referenced case. Also enclosed please find our firm's check in the amount of $25.00 for the filing fee.

If you should have any questions, please do not hesitate to contact me.

Very truly yours,

s/ Mason A. Goldsmith

Mason A. Goldsmith, Esq.

MAG/mlg Enclosures cc: John J. Garrett, *Pro Se* P.O. Box 101 Reidville, SC 29375

Appendix I

THE SUPREME COURT of SOUTH CAROLINA

John J. Garrett, Petitioner

v.

Lister, Flynn & Kelly, P.A. Toney Lister and Brendan Delaney, Respondents

The Honorable Roger L. Couch Spartanburg County Trial Court Case No. 2005-CP-42-00597

ORDER

For good cause having been shown, the time for serving and filing the Return to Petition for Writ of Certiorari in the above entitled matter is hereby extended until March 14, 2008.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY s/ Daniel E. Shearouse

CLERK

Columbia, South Carolina

February 5, 2008

cc: Mr. John J. Garrett

Mason A. Goldsmith, Esquire

120 (2)

No. 08-1163

Supreme Court, U.S.
FILED
APR 17 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN J. GARRETT,

Petitioner,

v.

LISTER FLYNN & KELLY, P.A., TONEY LISTER, AND BRENDAN DELANEY,

Respondents.

On Petition For Writ Of Certiorari To The South Carolina Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARAI

MASON A. GOLDSMITH, Fed. No. 2130
Attorney for Respondents
LOVE, THORNTON, ARNOLD & THOMASON, P. A.
Post Office Box 10045
Greenville, SC 26903
Telephone: (864) 242-6360

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition where the opinion of the state court of last resort has not decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

II. Whether Petitioner has presented compelling reasons to grant the Petition where a state court has not decided an important question of federal law that has not been, but should be, settled by this Court, nor has decided an important federal question in a way that conflicts with relevant decisions of this Court.

TABLE OF CONTENTS

	Page
Counterstatement of Questions Presented	i
Table of Contents	ii
Counterstatement of the Case and Reasons to Deny the Writ	1
Conclusion	5

COUNTERSTATEMENT OF THE CASE AND REASONS TO DENY THE WRIT

Initially, we point out that Petitioner failed to comply with Supreme Court Rule 14(1)(g)(i), which requires specifics about when and how a federal question was timely and properly raised in the state courts. Petitioner cannot comply with this rule because he did not timely and properly raise a federal question before the trial court.

Factually, this case is about Petitioner's failure to commence his action against Respondents within South Carolina's statute of limitations, which resulted in his suit being dismissed, with prejudice. Because Petitioner's "Question" and his "Statement of the Case" are difficult to follow and incomplete, Respondents are obliged to present the history of the case in order to meet their requirement to address any misstatement of fact.

Petitioner filed suit papers against Respondents in a timely manner but, due to defective service, failed to *commence* his action within the applicable statute of limitations' time limits. In South Carolina, a grace period is provided to one who files his summons and complaint within the statute of limitations but does not achieve service within the statutory period, provided that service is achieved within 120 days from filing. This grace period is available to one and all. South Carolina law specifies how service must be made. An action is not commenced unless proper service is achieved within 120 days after suit

is filed, which is where Petitioner fell short. Petitioner's efforts to serve the three Respondents were *timely*, but they were *defective*. Respondents moved to quash Petitioner's defective service and the motion was argued before the trial court. The trial court agreed that service was defective and that suit had, therefore, not been commenced within the statute of limitations, and accordingly the suit was dismissed, with prejudice. (Order, App. E, pp. 18a-28a.) The South Carolina Court of Appeals found that the trial court had ruled properly and further found that Petitioner had failed to preserve various issues for appeal. (Opinion, App. A, pp. 1a-12a.) The South Carolina Supreme Court denied Petitioner's Petition for Writ of Certiorari. (App. C, pp. 14a-15a.)

The relevant time sequence that led to the dismissal of Petitioner's suit follows. These facts are condensed from the order of the trial court and the opinion of the Court of Appeals. On February 28, 2005, Petitioner filed his summons and twenty-six page complaint. In the Complaint, Petitioner asserted that the Respondent attorneys and their law firm wrongfully discharged him as a client on March 15, 2002, almost three years before suit was filed. The applicable South Carolina statute of limitations is three years and the trial court calculated that the statute of limitations ran against the underlying causes of action on March 15, 2005. Because suit was filed (on February 28, 2005) before the March 15, 2005 deadline, the statute had not run when Petitioner personally filed the summons and complaint.

Obviously, Petitioner's alleged infirmities did not prevent his timely filing of the Summons and Complaint. Petitioner could have delivered the papers to the Spartanburg County Sheriff or a process server the day he filed them and had he done so, they would have undoubtedly been served before March 15, 2005. Even so, the grace period provided specified protection for Petitioner. Because Petitioner filed his Complaint on February 28, 2005, within the three year statute, he had 120 days, until June 28, 2005, to achieve proper service. Petitioner attempted service on the three Respondents in three different ways. On June 10, 2005, Petitioner personally attempted service on Delaney by going to his office, but service by a party is not permitted under the rules. Ten days later, on June 20, 2005, Petitioner attempted to serve the Respondent law firm by Registered Mail but delivery was not restricted to the law firm's Registered Agent as required and the Registered Agent did not sign for the delivery; therefore, this service was defective. On June 21, 2005, Petitioner attempted to serve Respondent Lister by regular mail which is not sufficient under the service statutes. In oral argument before the trial court, Petitioner admitted his failure to properly serve Defendants before the running of the 120 days from the filing date.

In his Petition for Writ of Certiorari to this Court, Petitioner contends that he was prevented by medical condition from acting in a timely fashion and suggests that his proceeding *pro se* should have some relevance. However, the trial court noted that

although Petitioner is a non-lawyer, he seemed quite adept at the legal process. (Order, App. E, p. 19a.) The court also observed that the records of the Spartanburg County Clerk of Court's Office revealed that Petitioner had been and was then currently involved in numerous separate lawsuits and that he represented himself in certain of those suits. (Order, App. E, p. 20a.) Finally, the trial court stated that

> [a]lthough Plaintiff argued he was medically disabled during this period of time and should be granted more time to serve Defendants, the Court takes judicial notice that Plaintiff was physically able to file at least two other suits, *pro se,* during this same period of time. Further, the Court record reveals that Plaintiff was represented by counsel in another suit about this same time period. (Order, App. E, p. 27a.)

Petitioner references a doctor's letter (Appendix G) and a doctor's affidavit (Appendix H) in support of his present Petition. This material was not properly before the trial court at the first hearing on September 8, 2005. It is noteworthy that Appendix G is dated December 12, 2005, several months after the first hearing and the same day as the hearing on Petitioner's Motion to Amend the trial court's judgment. The trial court declined to consider the letter (Appendix G) because it was not in proper form for consideration and any such letter should have been, but was not, brought before the court at the initial hearing on September 8, 2005. (Order, App. D, p. 17a.) The Court of Appeals held that Petitioner had abandoned the

issue of this letter in his appeal. (Opinion, App. A, p. 11a.) Having abandoned the issue, Petitioner cannot now raise it to this Court. Appendix H (an affidavit), dated a week before the second hearing of December 12, 2005, was not even handed to the trial court at the second hearing but could not have been considered had it been offered, for the same reasons. Appendix H was not before the trial court and, therefore, is not properly before this Court.

The cases cited by Petitioner have been reviewed. Respondents do not believe they contain any support for Petitioner's position. None remotely deals with facts such as those present here. It is Respondents' position that the citation of these cases in support of Petitioner's positions is a misstatement of the law.

CONCLUSION

In conclusion, Petitioner simply delayed almost three years, until the statute of limitations was about to run, to file his suit. Although Petitioner managed to avoid the three year deadline for filing and had the additional time of the grace period, he nevertheless failed to achieve proper service within the grace period. Rather than attempting three different types of service, he could and should have delivered the suit papers to the sheriff or a process server, who could have achieved proper service. During this time, he was filing and actively participating in other law suits. He had access to an attorney in at least one

such suit. Delay put him in jeopardy of the running of the statute of limitations. His own actions resulted in his case being properly dismissed.

Respondents respectfully submit that the Petitioner has not presented a federal question to the state courts, and he cannot properly appeal to this Court. Petitioner was treated properly by the state courts. Therefore, Respondents respectfully submit that the Petitioner's Petition for Writ of Certiorari must be denied.

Respectfully submitted,

MASON A. GOLDSMITH,
Fed. No. 2130
LOVE, THORNTON, ARNOLD
& THOMASON, P.A.
Post Office Box 10045
Greenville, SC 29603
Telephone: (864) 242-6360

Counsel of Record